LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 3 1961
JAMES R. BROWNING, Clerk

No. 75

In the Supreme Court of the United States

OCTOBER TERM, 1960

CARLIN CONSTANTINE VENUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, JR.,
Assistant Attorney General,
BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and regulation involved	2
Statement	3
Argument	7
Conclusion	13

CITATIONS

Cases:

Bartchy v. *United States*, 319 U.S. 484	9
D'Aquino v. *United States*, 192 F. 2d 338, certiorari denied, 343 U.S. 935	11
Gonzales v. *United States*, 348 U.S. 407	4
Parker v. *United States*, 252 F. 2d 680, certiorari denied, 356 U.S. 964	11
Pollard v. *United States*, 352 U.S. 354	12
Provoo (Petition of), 17 F.R.D. 183, affirmed *sub nom.* *United States* v. *Provoo*, 350 U.S. 857	12
Shibley v. *United States*, 237 F. 2d 327, certiorari denied, 352 U.S. 837	8
Smith v. *United States*, 360 U.S. 1	12
Sugarman v. *United States*, 249 U.S. 182	8
Taylor v. *United States*, 238 F. 2d 259	12
Venus v. *United States*, 266 F. 2d 386	3
Ward v. *United States*, 344 U.S. 924	9

Constitution, statutes and regulation:

United States Constitution, Sixth Amendment	11, 12
Universal Military Training and Service Act, Section 12(a) (50 U.S.C. App. 462(a))	2
18 U.S.C. 3282	11
Selective Service Regulation 1641.3, 32 C.F.R. 1641.2	2

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 865

CARLIN CONSTANTINE VENUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Vol. V, 3–16;[1] Pet. App. 21–35) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 24, 1960, and a petition for rehearing was denied on February 2, 1961 (Vol. V, 17, 18; Pet. App. 36, 37). On February 23, 1961, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to April 3, 1961, and the petition

[1] The record consists of five volumes. Volumes two through four, which are consecutively paginated, constitute the transcript in the district court and will be referred to as "Tr."

was filed on April 1, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioner's conviction for having willfully failed to keep his local draft board advised of an address where mail could reach him.

2. Whether petitioner was denied the right to a speedy trial.

STATUTE AND REGULATION INVOLVED

Section 12(a) of the Universal Military Training and Service Act, 50 U.S.C. App. 462(a), provides in pertinent part:

> Any * * * person charged as herein provided with the duty of carrying out any of the provisions of this title * * * or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *. * * *

Selective Service Regulation 1641.3, 32 C.F.R. 1641.3, provides:

> It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last

reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not.

STATEMENT

An indictment, returned on August 8, 1957, in the District Court for the Southern District of California, charged petitioner with having knowingly failed to report for induction into the armed forces on November 8, 1955 (Vol. I, 2–3). His conviction was reversed on appeal because of improper instructions to the jury. *Venus* v. *United States*, 266 F. 2d 386 (C.A. 9). Thereafter, petitioner was retried on two other occasions, but mistrials were entered because the jury, in each case, was unable to agree upon a verdict.

On December 23, 1959, a two-count indictment was returned in the district court which charged petitioner with having willfully failed to perform a continuing duty of reporting for induction in April 1956 (count one), and with having willfully failed on or about February 1, 1955, to keep his local Selective Service board notified of his address where mail would reach him (count two) (Vol. I, 4–6). Following a jury trial in May 1960, petitioner was convicted on count two of the second indictment (Tr. 572).* He was sentenced to three years' imprisonment and to pay a $500 fine (Tr. 592). On appeal, the conviction was affirmed, one judge dissenting (Vol. V, 3–16, 17; Pet. App. 21–35, 36).

*The first indictment and count one of the second indictment were dismissed by the court after the jury was unable to reach a verdict on these charges (Tr. 573).

The pertinent facts relating to the conviction on count two may be summarized as follows:

1. On May 16, 1949, petitioner filed a Selective Service Questionnaire with Local Board No. 140 of San Diego, California. He admitted that he knew from the time he registered that he was required to keep the board informed of his address where mail would reach him (Tr. 257). Prior to June 1954, petitioner notified the local board on five occasions of changes of addresses, three of which were San Diego addresses (Vol. I, 15). On June 7, 1954, petitioner wrote the following registered letter to the board (Vol. I, 13):

> At this time I wish to inform you of my departure from San Diego to Modesto, Calif. because of secular employment. The Federal Bureau of Investigation I have notified, when in Los Angeles after induction procedures. My new address is (Same employer) 1431 10th st. Modesto, Calif, but can be reached within one or two days, at my San Diego address.

The return address on the envelope was "650 Eleventh Street, San Diego," which was the address of petitioner's parents (Tr. 142–144) and was the address previously given by petitioner to the board.[3]

In early February 1955, petitioner moved from Modesto to Los Angeles where he engaged in the tree-cutting business with a friend (Tr. 210). He

[3] In August 1954, the local board reported to the United States Attorney that petitioner had failed to submit to induction in May 1954. An indictment for this offense was dismissed in July 1955 after this Court's decision in *Gonzales* v. *United States*, 348 U.S. 407.

left no forwarding address (Tr. 202–203). He testified that this was because when he left Modesto his parents, friends, and the Watch Tower Bible Tract Society knew his whereabouts (Tr. 219). On February 19, and 20, 1955, he helped his parents move from 11th Street to 30th Street in San Diego (Tr. 210, 213–215). He testified that, at about this time, he addressed and mailed from Los Angeles a post card to the local board giving notice that he was no longer living in Modesto and that mail could reach him at the 30th Street address of his parents (Tr. 213–216). He said that he put his parents' return address on the back of the post card (Tr. 215).[4] No such post card was received by the local board. Mrs. Haisch, a clerk of the local board, testified that, pursuant to direction from the United States Attorney's Office, she searched through about 3,000 out of 18,000 Selective Service files, and was unable to locate such a change of address card (Tr. 182–184, 188). She also searched through about 2,000 files in which the respective registrants were born in 1929 and 1930, and searched through about 1,000 files according to classifications (Tr. 183–184, 188). She said that petitioner's file was out of the office from November 1954 to July 1955, the file being at the California State Selective Service Headquarters at that time, but that a duplicate or "dummy" cover sheet was made

[4] A witness for petitioner testified that he was with petitioner when petitioner mailed the card. The witness did not see the writing but petitioner told him what it was for (Tr. 275–276).

for petitioner which would contain correspondence to or from petitioner while his regular file was out of the office (Tr. 166–167).

Petitioner testified that he lived at 2012 W. 6th Street in Los Angeles from February to about the middle of April 1955; that he then moved to Venice, California, where he lived for about a month; that he returned to Los Angeles and lived for about a week at the Del Mar Hotel, and for about a month at 513 Grand Street; and that he then moved to 2006 Strawns Drive where he lived from the summer to December 31, 1955 (Tr. 255–257).

Petitioner did not notify the board of any changes in address between June 7, 1954, and the end of 1955 (Tr. 122, 257).[5] The board sent a notice of classification as I–A to petitioner at the Modesto address in September 1955 and an induction notice was sent there in October 1955. Neither was returned to the board (Tr. 118–119, 128). Petitioner testified that he did not receive them (Tr. 216–217). The board made no attempt to reach petitioner through his parents or employer because the board assumed that petitioner had received the unreturned notices (Tr. 144–145, 151). Petitioner's first communication with the board after his letter of June 7, 1954, was an interview with an F.B.I. agent in April 1956 concerning petitioner's failure to report for induction in November 1955 (Tr. 191–192, 198–199).

[5] Petitioner also did not notify the board of his second marriage in December 1955, until April 9, 1956 (Tr. 192). In 1950 petitioner had notified the board of his first marriage, but he did not notify it of his subsequent divorce (Tr. 241–242).

2. The district court construed count two of the indictment as limited to the failure to give notice during the month of February 1955. The court charged the jury that if they found that petitioner had mailed a change-of-address notice to the local board in February 1955, "then whether or not the card was received by the Local Board, the defendant should be acquitted on count two in the second indictment" (Tr. 517). The court pointed out that petitioner had testified that he mailed the notice, and that it was within the province of the jury to believe or disbelieve him in its determination of the facts (Tr. 518). The court also charged (Tr. 540–541):

> Defense Counsel have called my attention to the fact that it is one of their contentions that there was a previous letter in the file in which the defendant had stated something about where mail might reach him [the letter of June 7, 1954]. It is, therefore, their contention that whether or not he mailed that letter of February 1, 1955, on their theory of the case, there was a place where mail would reach him and he therefore had complied. * * * If the Jury find that the defendant had at all times kept the Board advised where mail would reach him, then of course he is to be acquitted.

ARGUMENT

1. The sufficiency of the evidence to support the conviction depends, for the most part, on the resolution of issues of credibility, and therefore presents no issue for review by this Court. Petitioner had two defenses to the charge of failure to notify the board of his

change of address in February 1955: (a) that he did in fact send a notification at that time, and (b) that, in any event, his letter of June 7, 1954, stating that he could be reached at his parents' San Diego address within a day or two, was sufficient notification of an address where mail could reach him.

a. The first defense clearly depended on the jury's estimate of petitioner's veracity and is not seriously pressed in this Court. The jury could reasonably believe that no notification had been sent. The testimony of the clerk of the board showed that, even though the file was out of the office, the card would have been put in a dummy file if it had been received (Tr. 166–167). Moreover, her testimony showed that a thorough search had been made to make certain that the card had not been misfiled (Tr. 183–184, 188).* Although petitioner claimed that he had put a return address on the card, he did not assert

* Petitioner contends (Pet. 3) without argument that the trial court erred in failing to give his instructions number 45 and 46 to the jury regarding the presumption of receipt of mail matter duly addressed and mailed. But these instructions were covered in substance by the court when it charged the jury that a properly addressed and mailed letter or card is presumed to have been received by the addressee in the due course of the mails; that before such a presumption arises there must be "clear proof of the mailing" and proof that the communication was "properly addressed"; and that the presumption would not arise unless it were shown that the addressee "was at or in contact with" the address to which the communication was mailed (compare Vol. I, 95–96 with Tr. 502–503, 517, 540–541). See *Sugarman* v. *United States*, 249 U.S. 182, 185; *Shibley* v. *United States*, 237 F. 2d 327, 333 (C.A. 9), certiorari denied, 352 U.S. 873.

that it had been returned. Moreover, the jury, who saw and heard petitioner, could well have found that his credibility had been impeached.[7]

b. Petitioner stresses here (Pet. 13–18) the argument that his letter of June 7, 1954, constituted a sufficient notification of his parent's San Diego address where mail could reach him, and relies on (Pet. 13–16) *Bartchy* v. *United States,* 319 U.S. 484, 488–489, and *Ward* v. *United States,* 344 U.S. 924. In *Bartchy,* this Court held that the registrant's duty "is satisfied when [he], in good faith, provides a choice of forwarding addresses by which mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance." In *Ward,* the Court held that the evidence did not support the charge that the defendant had deliberately failed to comply with the Act where he had supplied the local board with the address of his employer, as well as his residence address, and the board did not attempt to reach him through the employer when it knew from the return of the notice that mail addressed to his residence had not reached him.

Here the Modesto address furnished the board in the June 7, 1954, letter was not the beginning of a chain of

[7] Petitioner had previously, in June 1950, failed to notify the board of a change of address; he had notified the board of his marriage in 1950, but not of his divorce; he had not properly informed the board of the address at which he lived for six months in Los Angeles in the latter part of 1955 or of his second marriage in December 1955.

forwarding addresses by which mail would ultimately reach petitioner. Petitioner left no forwarding address in Modesto after he moved to Los Angeles and the notices sent by the board to the Modesto address were neither forwarded nor returned to the board. As to the San Diego address of petitioner's parents, it was not the principal address which petitioner had given the board. The board had no reason to try the San Diego address because mail sent to the address which petitioner had represented was later than the San Diego address had not been returned. Petitioner himself did not regard the San Diego address as sufficient to fulfill his known duty to keep the board informed of his whereabouts, for that address was on file with the board before petitioner wrote the letter of June 7, 1954, notifying the board of a change of address. His claim that he did send a notification of change of address when he moved from Modesto—a claim which the jury must have disbelieved—again shows his awareness that the old address of his parents was not a sufficient compliance with his duty to keep the board informed. And, in any event, petitioner's parents moved in February 1955, and petitioner failed to notify the board of that fact, although he had helped his parents move. This in itself is sufficient to sustain petitioner's conviction for failure to notify the board of his change of address in February 1955.

Petitioner's argument amounts to this—that even though he moved from the address which he had given without notifying the board of that fact, and even though his parents moved from the other address which petitioner had given, without petitioner giving

notice of that fact—the board, in February 1955, might have found the new address of his parents and through them the new location of petitioner. On this theory a fugitive from justice would be excused if he could show that diligent police work could have uncovered his whereabouts. Petitioner cannot thrust this obligation on the board to escape his own delinquency. The jury reasonably found that petitioner knew that he was under a duty to inform the board of his new address, or at least of his parents new address, and that he deliberately failed to do so.

2. Petitioner argues (Pet. 18–20) that since the indictment for failure to notify the board of the address in February 1955 was not returned until 1959, he was denied a speedy trial, even though the indictment was returned within the five-year period of limitations fixed by Congress (18 U.S.C. 3282). Petitioner does not claim that he was denied a speedy trial between the time the indictment was returned, December 23, 1959, and the date of trial, May 1960. Petitioner's contention is therefore clearly without merit, for the right to a speedy trial under the Sixth Amendment "is one that arises *after* a formal complaint is lodged against the defendant in a criminal case" (emphasis added). *D'Aquino* v. *United States,* 192 F. 2d 338, 350 (C.A. 9), certiorari denied, 343 U.S. 935; see *Parker* v. *United States,* 252 F. 2d 680 (C.A. 6), certiorari denied, 356 U.S. 964; *Taylor* v. *United States,* 238 F. 2d 259, 262 (C.A. D.C.). Since petitioner makes no attempt to show prejudice to his defense by the delay, his argument in essence is merely that the

period of limitation is too long; that, however, is a matter for Congress to decide.

Contrary to petitioner's contention (Pet. 19–20), there is no conflict of authority between the decision below and *Pollard* v. *United States*, 352 U.S. 354, *Smith* v. *United States*, 360 U.S. 1, *Taylor* v. *United States*, 238 F. 2d 259 (C.A. D.C.), or *Petition of Provoo*, 17 F.R.D. 183 (D. Md.), affirmed *sub nom. United States* v. *Provoo*, 350 U.S. 857. In *Pollard*, the court merely assumed *arguendo* that the Sixth Amendment requires prompt sentencing (352 U.S. at 361)—an issue which is not involved here. In *Smith*, this Court, in reversing the defendant's conviction for kidnapping on the ground that a capital charge must be tried by indictment as provided for under Rule 7(a), F.R. Crim. P., and not by information as was done in that case, pointed out, in dictum, that if "arrest and incarceration are followed by inordinate delay prior to indictment, a defendant may, under appropriate circumstances, invoke the protection of the Sixth Amendment." 360 U.S. at 10. But that statement has no application to the instant case, for there was not only no "inordinate delay" after arrest and prior to indictment, but petitioner was at large on bail prior to and during the trial.

In *Taylor*, the offenses were committed in 1950, indictment was returned in 1954, and it was not until 1956 that the government attempted to notify the defendant of the charges or seek to obtain custody over him for purposes of trial (during this period, the defendant was incarcerated in a New York

penitentiary following conviction of state charges). In holding that the defendant was denied a speedy trial, the court said (238 F. 2d at 262): "We do not rely on the mere lapse of time between the commission of the offenses and the date of indictment, considered by itself, for that is governed by the statute of limitations. It is the combination of the factors set forth above which motivates our decision." And in *Provoo,* unlike the situation at bar, the defendant had been "imprisoned more than five years awaiting trial and pending appeal on a capital charge," and the court found that he was denied a speedy trial after the formal charges were levied against him. 17 F.R. D. at 203.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

MAY 1961.

U. S. GOVERNMENT PRINTING OFFICE 1961